Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

DONALD A. & IRIS R. STATLAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' sole and inviolate right to a jury trial in a Federal income tax case may be defeated by Internal Revenue Service action.

2. Whether the "subject matter" under 26 U.S.C. §7422(e) of a United States Tax Court Petition includes all issues already pending before the United States District Court or only the issues raised in the subsequently mailed Internal Revenue Service Notice of Deficiency challenged in the Tax Court Petition.

3. Whether the provisions of 26 U.S.C. §7422(e) may be implemented at any time prior to actual trial of a matter even though "hearing" has occurred under the specific terms of the statute.

As detailed herein it is respectfully submitted the U.S. Court of Appeals for the Seventh Circuit misapplied or overlooked the United States Constitution and statutes and regulations promulgated pursuant thereto as well as conflicting authority of several United States Supreme Court and other Federal Circuit Courts of Appeal decisions.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Iris R. Statland and Donald A. Statland, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 7, 1999.

This petition for a writ of certiorari involves the fundamental question of the right to a jury trial in a federal income tax case. Congress has provided that a jury trial will be available in tax litigation before the United States District Court. This is the *only* forum in which a taxpayer is afforded this fundamental right. Congress believed trial by jury should be available to taxpayers and cannot be presumed, in the absence of explicit language, to restrict this right.

It is respectfully submitted to authorize the loss of right to jury trial, Congress could have stated that, when a United States Tax Court Petition is filed, a United States District Court action covering taxes for the same tax year as the Tax Court Petition will be dismissed for want of jurisdiction. Congress did not do so. Instead it used language which ameliorates the dismissal action. The statute (26 U.S.C. §7422(e)) speaks in terms of "subject matter", *not* "cause of action". Even if a single year's taxes is one "cause of action", Congress authorized splitting it by stating the district court shall lose jurisdiction of the taxpayer's suit *only* ". . . to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of the taxpayer's suit for refund." It did *not* say the District Court loses jurisdiction of the entire "cause of action".

Thus, Congress clearly intended District Court jurisdiction be preserved. In interpreting taxation statutes the language of the statute should govern. The lower court's concern with judicial economics cannot be permitted to override the specific directions of Congress. Nor is judicial economics necessarily accomplished by dismissal of a pending U.S. District Court matter upon the filing of a Tax Court Petition. The lower court's decision permits District Court proceedings to be dismissed *any* time before "actual trial". Considerable judicial time already may have been expended before trial, including the possible consideration of summary judgment.

Congress clearly considered this by specifying 26 U.S.C. §7422(e) shall not apply at all if "hearing" already has occurred in the District Court. In this case, three (3) proceedings had taken place *before* the District Court proceeding was dismissed. It is respectfully submitted if any ambiguity can be deemed to exist as to the meaning of "hearing", it should be interpreted in the taxpayers' favor so as to prevent or reduce the ability of the Internal Revenue Service to forum shop. Congress could have said §7422(e) shall apply if a "trial" or "hearing on the merits" has occurred. Congress did not do so. Instead it used the more limited term "hearing". Congress sought to reduce the possibility of abuse by the Internal Revenue Service.

By specifying §7422(e) shall not apply if "hearing" has occurred, Congress sought to preserve judicial time, limit government forum shopping, preserve jurisdiction in the United States District Court and thereby preserve a taxpayer's fundamental right to a jury trial.

Certiorari is warranted in this case to preserve these Congressional goals, preserve taxpayers' Constitutional

and statutory rights and resolve the conflict of the lower court's decision with opinions of this Court and the other Circuit Courts of Appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 178 F.3d 465 (7th Cir. 1999) and appears in Appendix A hereto.

Magistrate Judge Guzman issued four (4) Opinions on behalf of the lower United States District Court. These opinions are dated September 13, 1993, March 23, 1994, January 25, 1995, and June 30, 1995, respectively. Each of these Opinions appears in Appendix B hereto. None of Magistrate Judge Guzman's Opinions is officially reported. The January 25, 1995 Opinion can be found at 95-1 U.S.T.C. ¶50,282.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 7, 1999 and appears in Appendix A. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 1, 1999 and appears in Appendix A at A-15. A timely Motion for Extension of Time for the filing of the instant Petition for Writ of Certiorari to November 28, 1999 was granted by this Court on September 20, 1999 and appears in Appendix C. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The pertinent Constitutional, Statutory and Rule provisions are as follows:

UNITED STATES CONSTITUTION:

Seventh Amendment:

> In all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES STATUTES:

26 U.S.C. §7422(e):

> **(e) STAY OF PROCEEDINGS.** If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Claims Court for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the

United States Claims Court, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the United States Claims Court for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

28 U.S.C. §1346(a)(1):

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum

alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *

28 U.S.C. §2402:

§2402. Jury trial in actions against the United States: Any action against the United States under Section 1346 shall be tried by the Court without a jury, except that any action against the United States under Section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury. 28 U.S.C. §2402.

COURT RULES:

United States Tax Court Rule 1:

Rule 1. Scope of Rules and Construction

(a) Scope. These Rules govern the practice and procedure in all cases and proceedings in the United States Tax Court. Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.

(b) Construction. These Rules shall be construed to secure the just, speedy, and inexpensive determination of every case.

Federal Rule of Civil Procedure 12(d):

> **(d) Preliminary Hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleadings or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

Federal Rule of Civil Procedure 13(a) and (b):

> **(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom, the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.
>
> **(b) Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, * * *

Federal Rule of Civil Procedure 38(a):

Jury Trial of Right.

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Federal Rule of Civil Procedure 41(a):

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

STATEMENT OF THE CASE

The facts may be summarized as follows:

Federal jurisdiction of the instant case is based on 28 U.S.C. §1346(a)(1). Pursuant to this provision, on December 1, 1992, Iris and Donald Statland (hereinafter referred to as "Petitioners") filed a timely Complaint in the United States District Court alleging they overpaid their federal income taxes for tax year 1976 and were entitled to a refund of $8,929.26. The Complaint contained a demand for trial by jury.

Three months after Petitioners filed suit, on February 12, 1993, the United States District Judge held the first of three hearings.

A second hearing was held on April 13, 1993 during which the case was assigned to Magistrate Judge Guzman. On May 10, 1993, a third hearing was held during which the timing of the government's expected discovery response was among the subjects discussed.

On June 4, 1993, three days before the government's discovery response was due and expected, the Internal Revenue Service (hereinafter referred to as "IRS") mailed a Notice of Deficiency to Petitioners. The Notice claimed that, according to the IRS's determination, there existed a $4,023 deficiency in Petitioners' 1976 federal tax payment. According to the IRS, the Complaint Petitioners had filed in the United States District Court alleging that the government owed them $8,929.26 for tax year 1976 was in error. Rather, the IRS had determined Petitioners actually owed the government $4,023 as a result of the carryback of unused investment tax credit from 1979 to 1976 having been fully used in 1979 as per IRS

proposed adjustments in 1979 to the basis of qualified investment property.

The Notice of Deficiency did not challenge the matters which had been raised in the Complaint pending before the United States District Court.

On June 22, 1993, the government filed a motion to stay the proceedings in the United States District Court based on the provisions of 26 U.S.C. §7422(e) because of the **proposed** deficiency set forth in the IRS's June 4, 1993 Notice of Deficiency. Section 7422(e) provides, in relevant part, the following:

> If the Secretary *prior to the hearing of a suit brought by a taxpayer in a district court* . . . for the recovery of any income tax, . . . mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court *for the redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court . . . shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund.* If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit . . . within the period of the stay of proceedings . . . . (*Emphasis supplied.*)

In response to the government's motion, Petitioners argued that §7422(e) did not require the United States

District Court to stay proceedings. Petitioners noted the initial sentence of §7422(e) provided that §7422(e) applies only if the IRS mailed its Notice of Deficiency "prior to the *hearing* of [the taxpayer suit]." Petitioners asserted "hearings" already had been held in the instant case and since the "hearings" occurred before the IRS mailed the Notice of Deficiency on June 4, 1993, §7422(e) was inapplicable. Consequently, the district court was not required to stay the proceedings.

While Magistrate Judge Guzman was considering the government's motion, the 90-day statutory period provided for filing a petition to challenge the IRS's Notice of Deficiency was expiring. Absent the timely filing of a Petition in the United States Tax Court, the government would be free to collect the amount the government asserted to be due in its Notice of Deficiency, together with interest thereon from 1976, although no Court had determined the government's claim to be correct.

Accordingly, on August 23, 1993, since the Magistrate Judge had *not* ruled upon the government's motion to stay proceedings, Petitioners filed a Protective Petition in the Tax Court challenging only those issues which properly were to be determined as within the Tax Court's jurisdiction and noting in the Petition that the matter properly was pending in the United States District Court.

After the 90-day statutory period for filing the Tax Court Petition had expired, on September 13, 1993, Magistrate Judge Guzman issued a Memorandum and Order in which he granted the government's motion to stay proceedings pursuant to §7422(e). He found that "the hearing of the [taxpayer's suit]" had not yet occurred. (See Appendix B.) Pursuant to the Magistrate

Judge's order, the stay remained in effect until November 1, 1993. On March 23, 1994, the motion which Petitioners' timely had filed for Amendment to the Court's September 13, 1993 Memorandum Opinion and Order was denied. (Appendix B.)

On June 27, 1994, before the Tax Court had ruled on Taxpayers' petition for a redetermination of the IRS proposed assessment, the government moved to dismiss the United States District Court case for lack of jurisdiction. Petitioners opposed the motion. Both parties relied upon the language of §7422(e), and in particular both parties relied on the provision (cited earlier) which states as follows:

> [I]f the taxpayer files a petition with the Tax Court, the district court . . . shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court *of the subject matter of taxpayer's suit for refund.* (*Emphasis provided.*)

Petitioners argued the district court lost jurisdiction over their suit *only* to the extent jurisdiction was acquired by the Tax Court over the subject matter of the district court case. Specifically, Petitioners claimed that they petitioned the Tax Court to determine issues relating solely to the IRS's adjustment reducing the 1979 investment tax credit which Petitioners properly had carried back and credited toward their 1976 tax year liability. The pending United States District Court case, on the other hand, contemplated an entirely different subject matter; namely, the adjustment to Petitioners' share of various partnerships' income as well as their entitlement to an additional exemption for a dependant. Petitioners claimed that the Tax Court case and the

district court case dealt with a different "subject matter" under §7422(e). Thus the district court was not divested of jurisdiction over "subject matter" pending before it.

On January 25, 1995 Magistrate Judge Guzman disagreed with Petitioners and granted the government's motion to dismiss the district court case in its entirety. (Appendix B.)

On June 30, 1995 Petitioners' timely Motion to Reconsider was denied. (See Appendix B.) Petitioners timely appealed the dismissal of their district court case. The appeal was argued on September 25, 1998 before a panel consisting of Circuit Court Judges Cudahy, Coffey and Kanne. On May 7, 1999, the Panel affirmed Magistrate Judge Guzman's determinations. (Appendix A.) On July 1, 1993 Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc before the Seventh Circuit was denied. The instant Petition requests a grant of the Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. Introduction.

The instant Petition should be granted for the following reasons:

1. The exceptional importance of the preservation of the inviolate right to trial by jury is especially significant in a tax refund suit such as the instant case where Congress has limited a taxpayer's right to a jury trial to the United States District Court;

2. To avoid conflict with *United States v. Joe Graham Post No. 119, American Legion*, 340 F.2d 474 (C.A. 5th

Cir. 1965) which was overlooked in the instant Seventh Circuit opinion and which preserved the United States District Court jurisdiction of the subject matter before it, when the taxpayer filed a Tax Court petition challenging a subsequently issued Notice of Deficiency. Contrary to the Seventh Circuit decision in the instant case, the *Joe Graham Post 119* decision confirmed the principle that issues not challenged in the Tax Court petition remain within the jurisdiction of the United States District Court pursuant to the provisions of 26 U.S.C. §7422(e); and

3. To avoid conflict with the decision of the United States Supreme Court in *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 247-248 (1988), which confirmed that hearing may qualify as such without being a trial and the United States Court of Appeals for the Third Circuit decision in *United States ex rel. Stinson v. Prudential Insurance*, 944 F.2d 1149 (3rd Cir. 1991), which confirmed the same principle.

In its opinion, the United States Court of Appeals for the Seventh Circuit determined:

(a) Taxpayers' sole and inviolate right to jury trial in a tax case may be lost.

(b) §7422(e) does *not* permit continued United States District Court jurisdiction over the subject matter pending before it if a Tax Court petition is subsequently filed challenging a newly issued IRS Notice of Deficiency **proposing** additional taxes due.

(c) §7422(e) may be implemented at any time prior to actual trial even though hearing has occurred under the terms of the statute.

As detailed herein, it is respectfully submitted the Court below misapplied or overlooked conflicting authority of several United States Supreme Court and other Federal circuit courts of appeal decisions.

II. The Panel's Opinion Incorrectly Determined Taxpayers' Inviolate and Sole Right to a Jury Trial in a Federal Income tax Case May Be Lost.

The United States Congress has preserved the United States District Court as the only forum in which a taxpayer may be afforded a trial by jury. It is respectfully submitted the lower court's decision in the instant case incorrectly affords the government an opportunity to deprive taxpayers of this *inviolate* right.

The lower court's decision permits the government to issue an unsubstantiated Notice of Deficiency claiming taxes due and use this Notice as a self-serving basis to deprive taxpayers of United States District Court jurisdiction and thereby the right to jury trial. In this case, the deficiency claimed was for $4,023. The undetermined claims could just as easily have been for millions of dollars. Given the lower court's decision, the only way a taxpayer can preserve his right to a jury trial in the United States District Court is to pay the unsubstantiated sum, together with interest thereon.[1] If a taxpayer is unable to pay the amount asserted to be due in the

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[1] Absent a timely Tax Court Petition, the government's position recognizes its right immediately to collect the deficiency asserted. (Gov.Br. 27, 31) A counterclaim for the deficiency in the United States District Court is merely permissive. It is not compulsory. (See Federal Rule of Civil Procedure 13(a) and (b).)

Notice of Deficiency and files a petition in the United States Tax Court challenging the Notice of Deficiency and the collection of the amount due, the lower court's decision permits the government to remove the *entire* case from the United States District Court to the Tax Court, where no right to trial by jury is afforded.

Thus, simply by asserting an unsubstantiated claim in its Notice of Deficiency for the same tax year as that pending in the United States District Court any time prior to the actual trial of the matter by the District Court, the government has gained jurisdiction of the Tax Court. The Tax Court is a forum in which the government is a party to every case, a forum in which the right to third party discovery and to obtain information from the IRS is more limited than in the United States District Court, and a forum in which no right to jury trial currently exists. The result is only the affluent will be secure in their right to the jury trial in tax cases preserved by Congress in the United States District Court.

Congress did not intend this result. The provisions of 26 U.S.C. §7422(e), enacted by Congress after the United States Supreme Court decision in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), which is relied on by the court below, were intended to avoid this consequence.

Citing the 1880 decision in *McElrath v. United States*, 102 U.S. (12 Otto) 426, 440 (1880), the court below notes, ". . . the right to jury trial does not apply to civil actions against the United States."

Yet the United States has conceded, ". . . there is a right to jury trial in actions against the United States only if a statute so provided . . . ."

As Petitioners noted below, the right to jury trial in the instant case is provided by statute. Congress has provided:

> §2402. Jury trial in actions against the United States: Any action against the United States under Section 1346 shall be tried by the Court without a jury, *except that any action against the United States under Section 1346(a)(1) shall, at the request of either party to such action, be tried by the Court with a jury*. 28 U.S.C. §2402. (*Emphasis provided.*)

The instant case was brought under §1346(a)(1). A jury trial was demanded. Yet the court below chose to ignore 28 U.S.C. §2402 in dismissing Petitioners' right to a jury trial in the instant case.

Moreover, again as noted by Petitioners below, the Federal Rules of Civil Procedure provide further:

> Rule 38: Jury Trial of Right
>
> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States *shall be preserved to the parties inviolate*. (Emphasis provided.)

Again, the court below made no effort to address the significance of this clear recognition of the right to a jury trial set forth in the Federal Rules as *inviolate*.

As detailed hereafter, §7422(e) contains no language negating this right to a jury trial. Rather the wording of §7422(e) confirms the continued jurisdiction of the United States District Court and preservation of a taxpayer's right to trial by jury. No case relied upon by the

court below authorizes the extinction of a properly demanded jury trial in any situation, let alone the filing of the Protective Petition in the Tax Court involved in the instant case.

Interpreting the meaning of §7422(e) as warranting dismissal of the pending United States District Court case deprives Petitioners of their only forum in which their inviolate right to a jury trial is preserved. Contrary to *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1959) cert. den. 476 U.S. 1183 (1960), relied upon by the court below, Petitioners have acted to preserve their right to jury trial by paying the tax and filing a complaint with the United States District Court. ***Olshausen* did not pay the tax and never sought relief in the District Court.**

Thus, as authorized by the Seventh Amendment to the United States Constitution, which provides:

> In all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

the United States Congress has attempted to preserve for taxpayers a right to jury trial by enacting 26 U.S.C. §7422(e). The lower court's decision nullifies this *inviolate* right. Once having given the right to trial by jury in tax cases, Congress did not enact §7422(e) to permit its removal. Given the fundamental nature of Petitioners' existing right to jury trial, the decision of the court below to take it away should be reviewed by this Court.

III. In Concluding the District Court Loses Jurisdiction in the Instant Case, the Lower Court Conflicts with 26 U.S.C. §7422(e), Enacted After the Supreme Court 1948 Decision in *Sunnen*, and Precedent of the United States Court of Appeals for the Fifth Circuit.

The Internal Revenue Code, 26 U.S.C. §7422(e) provides:

> If the Secretary *prior to the hearing* of a suit brought by a taxpayer in a district court or the United States Claims Court for the recovery of any income tax, estate tax, gift tax or tax imposed by chapter 41, 42, 43 or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court *for the redetermination of the asserted deficiency*, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States Claims Court, as the case may be, *shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund*. If the taxpayer does not file a petition with the Tax Court for redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit . . . within the period of the stay of proceedings. . . . (*Emphasis provided.*)

The Statute provides, in relevant part, if a United States Tax Court petition is filed challenging a notice that tax is claimed due for a year pending before the

United States District Court, the United States District Court loses jurisdiction **only** ". . . to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's refund suit." Section 7422(e) specifically limits the Tax Court jurisdiction to a ". . . redetermination of the asserted deficiency . . . ." set forth in the Notice of Deficiency. It does ***not*** authorize the Tax Court to decide issues pending before the United States District Court.

The court below disagreed with Petitioners' assertion that §7422(e) permits Petitioners to litigate separate issues for the same tax year in separate fora. The Seventh Circuit relied primarily on the 1948 United States Supreme Court decision in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948).

It is respectfully submitted Congress was aware of the 1948 *Sunnen* decision when it enacted 26 U.S.C. §7422(e) in 1954. Clearly there would have been no need to enact §7422(e) if Congress fully accepted the principles of *Sunnen, supra*. It did not. Congress recognized the ease with which the government could deprive the United States District Court of complete jurisdiction of tax matters by issuing an unproven Notice of Deficiency for amounts taxpayers could not pay and thereby force taxpayers to petition the Tax Court to avoid collection of unsubstantiated amounts, thus, under *Sunnen*, losing the United States District Court jurisdiction and the right to jury trial.

To prevent this, Congress, by enacting §7422(e), preserved United States District Court jurisdiction for subject matter not involved in the IRS Notice of Deficiency.

Moreover, the court below overlooked the conflicting decision in *United States v. Joe Graham Post 119, American Legion*, 340 F.2d 474 (C.A. 5th Cir. 1965), cert. denied 382 U.S. 824 (1965). In that decision, the Fifth Circuit permitted issues not challenged in the taxpayer's Tax Court Petition to remain within the jurisdiction of the United States District Court. On November 26, 1962 a tax refund suit had been brought before the United States District Court for the *fiscal* year ended June 30, 1961. Subsequently, on June 28, 1963, the IRS chose to issue a notice of deficiency for the *calendar* years 1944 through *December 31, 1960*. The taxpayer challenged this notice on August 1, 1963 by filing a Petition in the Tax Court. Thus, a portion of the calendar year before the Tax Court was involved in the fiscal year pending in the United States District Court.

In affirming the United States District Court determination it did not lose jurisdiction of the matter under §7422(e), the United States Court of Appeals for the Fifth Circuit stated (p. 477):

> The intention and purpose of Section 7422(e) are clear; the Taxpayer is to have a choice of tribunals *to try all or a part of the issues* which are within the subject matter of the refund suit; but both the District Court and the Tax Court cannot at the same time have jurisdiction *over the same issues presented by that subject matter*. (*Emphasis provided.*)

Thus, the Court confirmed the principle that issues not challenged in the taxpayer's Tax Court Petition remain within the jurisdiction of the United States District Court.

Moreover, the Panel's decision overlooked the United States Tax Court decision in *Hemmings v. Commissioner*, 104 T.C. 221 (1995). This is the very Court to which the matters in this case are being transferred. In *Hemmings, supra,* the Tax Court determined that a final judgment in a prior refund suit in the United States District Court for 1984 did *not* prevent the Commissioner from issuing a Notice of Deficiency for the *same* tax year and the Tax Court from maintaining separate jurisdiction over the issues raised in the Notice for the same tax years in which different issues had been decided in the District Court.

United States Tax Court Judge Begne reviewed the current state of the law in his dissenting opinion in *Estate of Mueller v. Commissioner*, 107 T.C. 189, 203, 236-237 (1996), aff'd 98-2 U.S.T.C. ¶60,325 (CA 6, 1998). Referring to *Hemmings, supra*, he noted the Tax Court had decided:

> . . . that a final judgment in District Court in a refund suit *didn't* prevent respondent (the Commissioner) from issuing a statutory notice for the same year on a different issue and this Court (Tax Court) from refusing to grant partial summary judgment to the taxpayers on the basis of *res judicata* . . . . We decided in *Hemmings* that the government was only prevented from litigating in a new suit after a concluded refund suit, all its compulsory counterclaims and such permissive counterclaims as are actually litigated. *Hemmings v. Commissioner*, 104 T.C. at 234. *What this means is that this Court has held that it's not always and for all purposes that all tax issues having to do with the same taxpayer and*

the same tax year are parts of one indivisible claim or cause of action. (Emphasis provided.)

Thus, as evidenced by the *Hemmings* decision, the Tax Court itself recognizes the permissibility of concurrent jurisdiction over cases involving the same tax year. The enactment of §7422(e) would not have been necessary if Congress accepted the principles of *Sunnen*. It is respectfully submitted the court below erred in *not* recognizing Congress' intent to preserve the United States District Court jurisdiction when it enacted §7422(e). The court below's decision incorrectly forces taxpayers to abandon United States District Court jurisdiction to avoid collection of a possibly incorrect proposed deficiency.[2]

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[2] In rendering its decision, the court below noted (Op. 13) ". . . the federal courts are overburdened enough without affording parties the luxury of litigating the same case in two different courts." Although this problem is of concern, preservation of the *inviolate* right to jury trial in the United States District Court should not be sacrificed. The conservation of judicial time and resources could be accomplished by deciding all the issues in the United States District Court without sacrificing the right to jury trial. (See T.Ct. Rule 1 and Federal Rule of Civil Procedure 41(a); Pet.Br. 13, fn.1.) Moreover, the lower court's decision may result in expenditure of greater judicial time by permitting transfer at any time prior to actual trial. Thus, the District Court may well have expended extensive time by holding extensive hearings and considering such matters as motions for summary judgment prior to losing jurisdiction.

Moreover, it is respectfully submitted Petitioners did not choose to file their "Protective Petition" with the Tax Court. Rather, they were required to do so, while the Magistrate Judge was considering the applicability of §7422(e), to avoid IRS collection of the asserted deficiency. If a timely Petition

(continued...)

IV. The Opinion below that "Hearing" Requires Actual Trial Conflicts with the U.S. Supreme Court and the U.S. Court of Appeals for the Third Circuit Determination That Hearing Qualifies as Such Without Being a Trial.

Section 7422(e), by its own terms, is inapplicable if an IRS Notice of Deficiency is not issued ". . . prior to the hearing of a suit brought by a taxpayer in a district court . . . ."

It is respectfully submitted the court below incorrectly determined the term "hearing" requires "actual trial", a requirement not set forth in the statute and in conflict with the U.S. Supreme Court and another Circuit.

In reaching its conclusion, the court below relied on a Tax Court Memorandum (hereinafter "TCM") decision in *Brown v. Commissioner*, 71 TCM 2301 (1996). In contrast to the Tax Court's regular decisions, the Tax Court has classified *Brown* as a Memorandum decision to indicate the limited precedental value to be afforded it in the Tax Court itself. Certainly, *Brown* is of even less precedental value before the U.S. Court of Appeals.

Yet the Appellate Court in the instant case defers to *Brown*. The court below dismisses (Appendix A; Op. 9, fn. 4) *Menard v. Bowman Dairy Co.*, 15 N.E.2d 1014, 1015

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[2] (...continued)
were not filed within 90 days after the June 4, 1993 Notice of Deficiency was mailed, this would have occurred.

Thus, as Magistrate Judge Guzman conceded ". . . different issues affecting the liability for a single income tax year may be litigated in different fora." (See June 30, 1995 Memorandum and Order, Appendix B at B-21). Certainly the mere "implication" of the tax return does not warrant a contrary result.

(Ill.Ct.App. 1938), but totally overlooks the U.S. Supreme Court decision in *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 247-248 (1988). *Mallen* was cited by Petitioners and conflicts with the determination of the court below. In *Mallen*, the U.S. Supreme Court determined a hearing may qualify as such without being a trial. See also *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149 (3d Cir. 1991), which had been cited by Petitioners to the court below and where the court held "hearing" to include complaint and discovery. ***No substantive issue need be considered for hearing to have been held.***[3]

As the lower court notes, after the United States District Court Complaint was filed three hearings were held in this case (Op. 3). The IRS's discovery had been fully responded to by Petitioners and the IRS was to respond to Petitioners' discovery by June 7, 1993 (Please see May 10, 1993 transcript of Hearing, Docket Entry No. 22). Instead of responding to discovery, the government issued its June 4, 1993 Notice of Deficiency. In enacting §7422(e), Congress could *not* have intended to permit the government to avoid responding to discovery in the United States District Court by issuing a Notice of Deficiency. Again, to permit this potentially allows the government to claim millions and whether justified or not, taxpayers would have to pay to avoid having their

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[3] The court below was concerned by Congress' use of the term "the hearing" as opposed to "a hearing". It is respectfully submitted use of the term "the" as opposed to "a" hearing does not demand interpreting hearing to mean actual trial. Had Congress intended a trial be required it would have specified this requirement. The structure of §7422(e) would suggest "hearing" was all that Congress intended.

entire case transferred to the United States Tax Court, which would vitiate any right to jury trial in income tax cases. The decision below creates a technical procedural benefit in favor of the IRS which clearly is not encompassed in the terms of §7422(e) or contemplated by Congress.

The court below recognized hearing of the case had occurred before the government chose to issue its June 4, 1993 Notice of Deficiency. Yet it superimposed the requirement of an "actual trial" occurring to avoid application of §7422(e). Doing so affords the government the unjustifiable opportunity to issue a Notice of Deficiency both before answering discovery and after having the opportunity to sense the District Court's attitude toward the case. The terms of the statute do not justify this result.

The lower court's decision in approving the loss of United States District Court jurisdiction after hearing further conflicts with the Federal Rules of Civil Procedure, Rule 12(d), stated in relevant part:

> The defenses in subdivision (b) and the motion for judgment mentioned in subdivision (c) shall *be heard* and determined before trial *unless the Court orders that the hearing and determination thereof be deferred until the trial.* (*Emphasis provided.*)

Again, although cited to the court below, it did not consider this Rule in its decision. The Rule clearly contemplates the United States District Courts are authorized to conduct hearing separate from trial. Section 7422(e) does not require trial to have occurred to preclude the Section from being implemented.

The lower court's decision incorrectly permits the government after hearing to issue a Notice of Deficiency any time prior to actual trial for an amount sufficient to force taxpayer to petition the Tax Court to avoid immediate collection. The government is then free to invoke §7422(e) and escape jurisdiction of the United States District Court when it senses matters are not going its way, thereby leaving taxpayers with no effective right to jury trial in federal income tax matters.

CONCLUSION

For the foregoing reasons, it is respectfully requested this Court grant the instant Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated: November, 1999.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3025

DONALD A. STATLAND and IRIS R. STATLAND,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92 C 7858—**Ronald A. Guzman**, *Magistrate Judge.*

ARGUED SEPTEMBER 25, 1998—DECIDED MAY 7, 1999

Before CUDAHY, COFFEY and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge.* Plaintiffs-Appellants Donald and Iris Statland ("the Statlands") allege that they overpaid their federal income tax for the tax year of 1976, and are entitled to be reimbursed for the overpayment in the amount of $8,929. In December, 1991, the Plaintiffs filed a "taxpayer's refund suit" against the government in the United States District Court. Thereafter, the IRS issued a Notice of Deficiency to the Statlands, alleging that they had actually *underpaid* their 1976 income tax and owed a total of $4,023 as a result of the underpayment. The Plaintiffs-Appellants responded with the filing of a petition in the United States Tax Court asking for a redetermination of their 1976 tax liability.

After the Statlands filed their petition in the tax court requesting a redetermination of the IRS's assessment, the government filed a motion to dismiss the case (the taxpayer's refund suit) for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Magistrate Judge Ronald A. Guzman granted the motion and dismissed the case for lack of jurisdiction pursuant to 26 U.S.C. §7422(e). The magistrate found that under the statute, the district court lost jurisdiction once the Statlands filed a petition with the tax court requesting a redetermination of the IRS's assessment. The Plaintiffs appeal. We AFFIRM.

BACKGROUND

On December 1, 1992, Donald and Iris Statland filed a complaint in the United States District Court alleging that they overpaid their federal income taxes for tax year 1976 and thus were entitled to be reimbursed as a result of their overpayment of $8,929.26. The alleged overpayment resulted from two adjustments that the Statlands contend should be made to their 1976 income tax return: lessening their share of income from a business in which the Statlands possessed a partnership interest; and the Statlands' entitlement to an additional exemption for a dependant that they had originally been unable to claim.[1]

Three months after the Statlands filed suit, on February 12, 1993, the district judge held the first of three status hearings. Over the course of these three meetings, the parties entered their initial appearances, consented to have Magistrate Judge Ronald A. Guzman preside over the case, discussed the potential avenues of appeal for the Statlands if they lost their case before the magistrate

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[1] The Statlands alleged that due to provisions contained in the Tax Reduction and Simplification Act of 1977, Mr. Statland's father was permitted to exclude sick pay received in 1976. The Statlands alleged that this adjustment lowered the father's income, and qualified the father as the Statlands' dependent, thus providing them with a deduction.

judge, and set dates for the end of discovery. The substantive issues in the Statlands' taxpayer relief suit were not discussed in any of these status conferences, though at one point during the third meeting the parties did briefly refer to a separate proceeding involving the Statlands in the tax court.

On June 4, 1993, the IRS mailed a Notice of Deficiency to the Statlands which explained that, according to the IRS's determination, there existed a $4,023 deficiency in their 1976 federal tax payment. According to the Internal Revenue Service, the Statlands' district court complaint, alleging that the government owed them $8,929.26 for tax year 1976, was in error. Rather, the IRS had determined that the Statlands actually owed the government $4,023 as a result of miscalculations in the Statlands' 1976 tax return documents.[2] The IRS notice alleged that an adjustment was required to be made to the Statlands' 1979 tax return, and the change reduced a net operating loss that the Statlands had attempted to claim as investment credit and carry back to their 1976 return. According to the IRS, as a result of the adjustment there was *in fact* no investment credit available to be carried back to 1976, thus the Statlands erroneously carried back credit to their 1976 tax return that never existed. The IRS made the proper adjustments necessary to compensate for this oversight, and determined that the Statlands' tax liability for 1976 increased by $4,023, the amount of the alleged deficiency.[3]

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[2] Specifically, the Notice of Deficiency alleged that the Statlands attempted to carry back unused investment credit to their 1976 return. However, after the IRS made adjustments to the qualified investment property which formed the basis for the investment credit, the credit was reduced significantly. As a result, the entire investment credit was utilized in 1979, and was unavailable to be carried back to the Statlands' 1976 return.

[3] The record reveals that the $4,023 the Statlands owed to the government was solely a tax liability and did not include the imposition of any penalties.

On June 7, 1993, the IRS sent a letter to the Statlands which referenced the Internal Revenue Code, 26 U.S.C. §7421 et seq., and stated that proceedings in the Statlands' court case before Magistrate Judge Guzman would be effectively stayed pursuant to 26 U.S.C. §7422(e), since the IRS mailed the Notice of Deficiency to the Statlands on June 4, 1993. The IRS specifically cited to §7422(e) which provides, in relevant part, the following:

> If the Secretary *prior to the hearing of a suit brought by a taxpayer in a district court* . . . for the recovery of any income tax, . . . mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for the redetermination of the asserted deficiency, and for 60 days thereafter. *If the taxpayer files a petition with the Tax Court, the district court . . . shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund.* If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit . . . within the period of the stay of proceedings . . .. (Emphasis supplied.)

On June 22, 1993, the government filed a motion to stay the proceedings in the district court pursuant to §7422(e). The Statlands argued that §7422 did not require the district court to stay proceedings and noted that the initial sentence of §7422(e) requires the IRS to mail the Notice of Deficiency "prior to the hearing of [the taxpayer suit]." They proceeded to argue that the term "hearing" should be broadly construed, and that the three status conferences constituted "hearings" of their taxpayer suit. The Statlands concluded that since the "hearings" occurred before the IRS mailed the Notice of Deficiency on June 4, 1993, §7422(e) was inapplicable and did not require the district court to stay proceedings.

On August 23, 1993, before the magistrate judge had ruled upon the government's motion to stay proceedings, the Statlands also filed a petition in the tax court pursuant to §7422(e). In the petition, they requested a redetermination of the IRS's conclusion that the Statlands owed $4,023 to the IRS for tax year 1976.

On September 13, 1993, the district judge issued a memorandum and order in which he rejected the Statlands' argument that §7422(e) did not apply, and proceeded to grant the government's motion to stay proceedings pursuant to §7422(e). The magistrate judge found that "the hearing of the [taxpayer's suit]" had not yet occurred, specifically noting that "in the instant case it cannot be concluded that any type of substantive hearing has taken place with respect to the merits of the Statlands' case . . .. None of the [three status conferences] could be argued to have substantively determined any of the issues in the pending litigation or raised any arguments as to *res judicata*. Thus I have concluded that a hearing has not taken place for purposes of [§7422(e)]." Pursuant to the magistrate judge's order, the stay remained in effect until November 1, 1993.

On June 27, 1994, before the tax court had ruled on the Statlands' petition for a redetermination of the IRS assessment, the government moved to dismiss the Statlands' district court case for lack of jurisdiction, and the Statlands opposed the motion. Both parties relied upon the language of §7422(e), and in particular both parties relied on the provision (cited earlier) which states as follows:

> [i]f the taxpayer files a petition with the Tax Court, the district court . . . shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund.

In support of their request for dismissal, the government alleged that because the Statlands filed their August 23,

1993, petition in the tax court (requesting a redetermination of the IRS's asserted deficiency in the 1976 tax payment), the Statlands had chosen to litigate in the tax court, and §7422(e) mandated that the district court had lost jurisdiction over the Statlands' lawsuit.

The Statlands argued that the district court lost jurisdiction over their suit *only* to the extent jurisdiction was acquired by the tax court over the subject matter of the district court case. Specifically, the Statlands claimed that they petitioned the tax court to determine issues relating solely to the IRS's adjustment reducing the 1979 investment tax credit which the Statlands had credited toward the 1976 tax year. Their district court case, on the other hand, contemplated an entirely different subject matter; namely, the adjustment to the Statlands' share of partnership income as well as their entitlement to an additional exemption for a dependant. The Statlands claimed that the tax court case and the district court case were separate and distinct and dealt with a different "subject matter" under §7422(e), thus the district court was not divested of jurisdiction over their district court case.

The magistrate judge disagreed with the Statlands' attempt to distinguish the cases and granted the government's motion to dismiss. The judge found that "[d]espite the Statlands' attempts to separate the various components of their federal income tax liability for 1976, the primary issue is whether these components combine to realize a loss or instead establish that a deficiency was due that year." The court further noted that the Statlands' district court complaint demonstrated that they had attempted to carry their 1979 unused investment tax credit back to 1976, and thus the issues surrounding the 1979 credit actually bore upon whether the Statlands owed taxes for tax year 1976. Finally, the magistrate judge found that "the Statlands may pursue their suit as to such a single claim in the District Court or the Tax Court, but they cannot litigate in both. *Flora v. United States*, 362 U.S. 145, 166 (1960)." The judge concluded that when the

Statlands chose to petition the tax court for a redetermination of the IRS's asserted deficiency, the clear language of §7422(e) effectively divested the district court of jurisdiction over "all possible issues controlling the determination of the amount of tax liability for [1976]." Based on these findings, the magistrate judge granted the government's motion to dismiss the Statlands' court case in its entirety, and the case proceeded in the tax court. The Statlands now appeal the dismissal of their district court case.

ISSUES

On appeal, the Statlands raise three issues:

(1) whether the magistrate judge properly found that the three status conferences before the district court and the magistrate judge did not constitute "the hearing" of the Statlands' taxpayer refund suit for purposes of 26 U.S.C. §7422(e);

(2) whether the magistrate judge correctly determined that the tax court had acquired jurisdiction over the entire subject matter of the Statlands' district court taxpayer refund suit for purposes of 26 U.S.C. §7422(e); and

(3) whether the dismissal of the Statlands' lawsuit unconstitutionally deprived them of their Seventh Amendment right to a jury trial.

DISCUSSION

This Court reviews *de novo* the district court's dismissal for lack of jurisdiction. *See Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994). The court must take all well-pleaded allegations in the plaintiffs' complaint as true and draw all reasonable inferences in favor of the plaintiffs. *See Rueth v. United States Envtl. Protection Agency*, 13 F.3d 227, 229 (7th Cir. 1993).

I. *Whether the magistrate judge properly found that the three status conferences before the district court and the magistrate judge did not constitute "the hearing" of the Statlands' taxpayer refund suit for purposes of 26 U.S.C. §7422(e).*

Section 7422(e) requires the district court to stay proceedings in a taxpayer refund suit only if the IRS mails to the taxpayer a Notice of Deficiency "*prior to* the hearing of [the taxpayer's district court suit] . . .." (Emphasis supplied.) The Statlands allege that the IRS's June 4, 1993, Notice of Deficiency was mailed following, *not prior to*, the three "hearings" that occurred in the district court. The Statlands contend that because the Notice of Deficiency was not mailed until *after* these three hearings were conducted, the provisions of §7422(e) are totally inapplicable to this case. If §7422(e) is inapplicable, then the trial court was not divested of jurisdiction over the case, and dismissal was improper.

It is undisputed that between the time that the Statlands filed their district court complaint and the time the IRS mailed the Notice of Deficiency on June 3, 1993, the parties engaged in a total of three meetings. Over the course of these conferences, the parties entered their initial appearances, consented to a magistrate judge presiding over the case, discussed the Statlands' option to appeal a decision by the magistrate judge, and set discovery deadlines. In addition, in the third conference, Mr. Statland (who represented himself in these proceedings) mentioned that he was involved in a separate, ongoing tax court proceeding which potentially impacted their claims. The judge did not respond to Mr. Statland's comment in any manner. Over the entire course of these three meetings, not one of the substantive legal issues raised in the Statlands' district court case was considered by the court. We are called upon to consider whether these meetings constitute "the hearing of [the taxpayer's district court suit]" as used in §7422(e), such that the Statlands properly contend that the government failed to send the Notice

of Deficiency "prior to the hearing" of the district court case. If so, they argue, the district court was not required to stay proceedings, not deprived of jurisdiction over their case, and should not have dismissed their case.

In finding that §7422(e) required a stay of proceedings in the Statlands' district court case, Magistrate Judge Guzman found that "[n]one of these three appearances substantively determined any of the issues in the pending litigation or raised any arguments as to *res judicata*. Thus I have concluded that a hearing has not taken place for purposes of 26 U.S.C. §7422(e)." After reviewing the transcripts contained in the record, we agree with the magistrate judge's conclusion that as a factual matter, none of the three meetings even explored, much less determined, any of the substantive issues being disputed in the Statlands' refund suit. Moreover, the record does not reflect that either the district judge or the magistrate judge entered any judgments which could constitute *res judicata* as to other issues in the controversy.

The key to ruling upon the Statlands' claim is to decipher what exactly Congress meant by the phrase "prior to *the hearing of* [the taxpayer's district court suit]" as contained in §7422(e). The Statlands argue that the term "hearing" is broadly construed and does not require that a trial occur. The government, on the other hand, alleges that "the hearing" of the case is equivalent to "the trial" of the case.[4] The proper interpretation of the phrase "the hearing" as used in §7422(e) was recently addressed

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[4] The Statlands state that a "hearing" is frequently used to describe "whatever takes place before magistrates clothed with judicial functions . . . at any stage of the proceedings subsequent to its inception." (Quoting *Menard v. Bowman Dairy Co.*, 15 N.E.2d 1014, 1015 (Ill. Ct. App. 1938)). But the Statlands' case involves a federal statute utilizing the phrase "*the* hearing," not "*a* hearing." As such, the *Menard* case does not help us decipher what Congress meant when it referred to "the hearing" in §7422(e).

in *Brown v. Commissioner*, 71 T.C.M. (CCH) 2301 (1996). In that case, petitioner Brown filed a complaint with the United States Court of Federal Claims concerning his tax liabilities for the tax years 1990 and 1991. The IRS then sent the petitioner a Notice of Deficiency, alleging that he failed to report income for tax years 1990 and 1991. Brown wanted to contest the determinations made by the IRS, and filed a petition for a redetermination with the United States tax court pursuant to §7422(e). Thereafter, petitioner Brown argued that the tax court was without jurisdiction to hear the case. The tax court judge disagreed, and found that:

> To avoid concurrent jurisdiction over cases involving the same taxable year, Congress enacted section 7422(e). . .. Subsection (e) does not apply if the case in the Court of Federal Claims or the District Court . . . has already proceeded to a hearing, that is, to actual trial. (Citations omitted). The main thrust of section 7422(e) is to prevent two courts from having jurisdiction of the same taxable year at the same time. *Flora v. United States*, 362 U.S. 145, 166 (1960). . . . [I]f the taxpayer files a petition with the Tax Court before a hearing takes place in the refund suit, then the refund suit is stayed. Since [the IRS] filed a notice of deficiency *prior to the actual trial in the case* before the Court of Federal Claims, . . . this Court does have jurisdiction over petitioner's 1990 and 1991 taxes as determined in the notice of deficiency. (Emphasis added.)

In the case under consideration, the Statlands' district court case has not proceeded to an actual trial as is required by the *Brown* decision. The three district court meetings could not even remotely be interpreted as "actual trials"; rather, the transcripts of proceedings reveal that these meetings were mere status conferences wherein none of the issues which would be disputed at trial were even touched upon. Where the case has not proceeded to

actual trial, "a claimant is given the option of pursuing his suit in the District Court or in the tax court, but he cannot litigate in both." *Flora*, 362 U.S. at 166. We agree with the *Brown* court's reasoning, and hold that once the Statlands opted to litigate in tax court, the magistrate judge was bound to apply §7422(e). We further hold that the magistrate judge followed the clear mandate of §7422(e) when he stayed the district court proceedings and later dismissed the case.

II. *Whether the magistrate judge correctly determined that the tax court had acquired jurisdiction over the entire subject matter of the Statlands' district court taxpayer refund suit for purposes of 26 U.S.C. §7422(e).*

Section 7422(e) specifies that where a taxpayer has filed a petition with the tax court, the district court in which the action is pending loses jurisdiction over the taxpayer's suit "to *whatever extent* jurisdiction is acquired by the tax court *of the subject matter* of the taxpayer's suit for a refund." 26 U.S.C. §7422(e) (emphasis added). The magistrate judge found that the tax court acquired jurisdiction over "all possible issues controlling the determination of the amount of tax liability for the year in question [1976] . . .."

The Statlands argue that under §7422(e), the tax court does not simply usurp jurisdiction *over the entire subject matter* of the Statlands' district court claim. Rather, they contend that §7422(e) permits them to proceed in both the United States District Court for the Northern District of Illinois and the United States Tax Court because each court is examining *a different subject matter* affecting the Statlands' 1976 tax situation. Specifically, the Plaintiffs-Appellants contend that the tax court is dealing with the narrow issue of whether a tax investment credit from 1979 was properly carried back to their 1976 taxes. The district court, on the other hand, is primarily concerned with the Statlands' refund action claims concerning their

distributive share of partnership income and their entitlement to an additional exemption for a dependant in 1976.

We disagree with the Statlands' argument that they are permitted to litigate these issues in separate fora. The Statlands admit that the taxpayer refund suit they initiated in district court, as well as the petition (for a redetermination of the IRS assessment) that they filed with the tax court, center around whether or not they are entitled to a refund from the federal government for overpayment of their income taxes for tax year 1976. The Notice of Deficiency sent by the IRS stated that the Statlands owed $4,023 for tax year 1976.[5] The Statlands' original district court action alleged that they had overpaid for the tax year 1976. Thus, both the Notice of Deficiency (which the Statlands challenged in tax court), and the Statlands' complaint (which they filed in the district court), involved only tax year 1976. It is a well-established principle that each tax year is the origin of a new liability and, more importantly for purposes of the instant case, a separate cause of action. *See Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). Thus, "in federal tax litigation, one's total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation." *Finley v. United States*, 612 F.2d 166, 170 (5th Cir. 1980). We agree with the magistrate's conclusion that:

> [t]he Tax Court acquired jurisdiction . . . over the subject matter of the refund as it referred to the cause . . . of action involved in the deficiency notice. This included all possible issues controlling the determina-

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[5] As mentioned previously, the notice also noted that when the Statlands had originally filed their 1976 return, they had carried back unused investment credit from tax year 1979 to their 1976 tax assessment. However, due to adjustments made in the Statlands' taxable income in 1979, there was actually no investment credit available to be carried back to 1976.

> tion of the amount of tax liability for [1976] whether or not raised by the deficiency notice. The Tax Court therefore acquired jurisdiction over any matter concerning an adjustment to the Statlands' 1976 tax liability.

Under §7422(e), the Statlands were authorized to pursue the suit surrounding the 1976 tax payments in either the district court or the tax court, but not both. *See Flora*, 362 U.S. at 166. Once the Statlands chose to file a petition in the tax court for a redetermination of the 1976 deficiency alleged by the IRS, the Statlands effectively opted to litigate all issues surrounding their 1976 taxes in the tax court instead of the district court, not in two separate venues at the same time. Section 7422(e) was enacted precisely to avoid concurrent jurisdiction over cases involving the same taxable year. *See Brown*, 71 T.C.M. (CCH) 2301 (1996). Congress's goal in enacting §7422(e) was laudable, for as we have often noted, the federal courts are overburdened enough without affording parties the luxury of litigating the same case in two different courts. *See, e.g., Dunn v. Peabody Coal Co.*, 855 F.2d 426, 429 (7th Cir. 1988) (praising legislation which limited plaintiff's remedy to a single proceeding and thus "cuts down on the already heavy caseload of our overburdened court system.").[6]

We hold that the clear language of §7422(e) should have made the Statlands aware of the consequences of their decision to file the petition for a redetermination, and the magistrate judge correctly concluded that once the Plaintiffs chose the tax court venue, the district court was deprived of jurisdiction over the case.

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[6] Other benefits are gained if the Statlands' case is resolved in one forum. These include conserving judicial time and resources, providing convenience to witnesses involved in the litigation, and easing the financial burden that would be placed upon the government if it was required to litigate two separate cases.

III. *Whether the dismissal of the Statlands' lawsuit unconstitutionally deprived them of their Seventh Amendment right to a jury trial.*

The Statlands' last point of contention is that the district court's dismissal of the Statlands' district court lawsuit unconstitutionally deprives them of their Seventh Amendment right to trial by jury. When the Statlands filed their complaint in the district court, they demanded a jury trial. However, when they filed a petition in the tax court and divested the district court of jurisdiction, their case was dismissed and their request for a trial before a jury was extinguished. The Statlands allege the dismissal thus infringes their Seventh Amendment right to a jury trial. We disagree.

Initially, we note that the Statlands could have had a jury trial by opting not to file a tax court petition. *See Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1959) (taxpayer's deprivation of his "right to a jury trial" resulted from his own act of filing tax court petition). But once the Statlands elected to litigate their case in the tax court, the district court was without jurisdiction, and thus there could be no trial in the district court, whether before a judge or a jury. The question, then, is whether the Statlands were entitled to a jury trial in the tax court. We note that the right to a jury trial does not apply to civil actions against the United States. *See McElrath v. United States*, 102 U.S. (12 Otto) 426, 440 (1880); *see also Atlas Roofing Co. v. CSHRC*, 430 U.S. 442, 450-51 (1977). Our Circuit and others have held that there is no right to a jury trial in the tax court. *See Coleman v. Commissioner*, 791 F.2d 68, 71 (7th Cir. 1986); *McCoy v. Commissioner*, 696 F.2d 1234, 1237 (9th Cir. 1983); *Funk v. Commissioner*, 687 F.2d 264, 266 (8th Cir. 1982); *Blackburn v. Commissioner*, 681 F.2d 461, 462 (6th Cir. 1982); *Mathes v. Commissioner*, 576 F.2d 70, 71 (5th Cir. 1978). The Statlands were not unconstitutionally deprived of their Seventh Amendment right to trial by jury.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 1, 1999.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

DONALD A. and IRIS R. STATLAND,

Plaintiffs-Appellants,

No. 95-3025 v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92 C 7858—Ronald A. Guzman, *Magistrate Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

[Entered September 13, 1993]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DONALD A. STATLAND and IRIS R. STATLAND,	)	
Plaintiff,	)	
v.	)	**No. 97 C 7858**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Pending is Defendant United States of America's ("USA") motion for stay pursuant to 26 U.S.C. § 7442. For the reasons listed the USA's motion is hereby granted.

BACKGROUND FACTS

On December 1, 1992, plaintiffs Donald A. Statland and Iris R. Statland ("Statlands") filed the instant action seeking a refund of taxes paid for the year 1976. On April 15, 1977 the Statlands filed their joint federal income tax return for the calendar year 1976 with the Internal Revenue Service in Kansas City, Missouri and paid the sum of $10,138.66 in income taxes. On February 6, 1980 the Statlands filed with the District Direc-

tor their first claim for refund of $315.00. On April 15, 1980 the Statlands filed a second claim for refund of $4,907.26. On September 24, 1980 the Statlands filed a third claim of refund for $4,022.70 based on a net operating carryback from 1976 to 1979. This amount was for an amount not including the amounts claimed on February 6, 1980 and April 15, 1980. Finally on December 17, 1986, at the request of the Appellate Division of the Internal Revenue Service, the Statlands filed with the District Director a claim for refund of $8,929.96.

On December 1, 1992 the Statlands filed the instant complaint seeking the $8,929.26. The USA filed an Answer to the Statland's complaint February 1, 1993. On February 12, 1993 Judge Aspen held the initial hearing in this case. On April 13, 1993 Judge Aspen held a second hearing in this case. During this second hearing Judge Aspen considered the matter and, with the agreement of the parties, reassigned this case to this Magistrate Judge.

On May 10, 1993 the Statlands informed this court that they had complied with the USA's discovery request and that their request for documents was pending for response on June 7, 1993. On June 7th, however, rather than responding to the Statlands discovery, the USA faxed a letter to the Statlands stating that a Notice of Deficiency had been mailed on June 4, 1993. On the same day the USA served upon the Statlands a motion to stay proceedings for 150 days pursuant to 26 U.S.C. §7422(e).

The Statlands oppose this motion arguing that the provisions of 26 U.S.C. §7422(e) are inapplicable to the

instant case in light of the fact that Judge Aspen has held two hearings and Magistrate Judge Guzman one. The Statlands point out that the text of section 26 U.S.C. §7422(e) is only applicable prior to hearing, and in this case hearings have been held on three (3) separate occasions. Thus, no stay should be granted and the case should continue to proceed before this court. In the alternative the Statlands have requested that this court conduct an examination to determine the propriety of the issuance of the June 4, 1993 Notice of Deficiency for 1976.

DISCUSSION

The Internal Revenue Code, 26 U.S.C., §7422(e) provides:

> If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Claims Court for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States Claims Court, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer

> does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suit against officers or employees of the United States, within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. . . .

The issue presented is whether the hearings conducted to date bar the application of the stay provision set forth in 26 U.S.C. §7422(e). After reviewing the record and the case law I find that it does not.

The Statlands correctly argue that the term "hearing" is broadly construed and does not require that a trial occur, e.g. *Federal Deposit Ins. Corp v. Mallen*, 486 U.S. 230, 248 n. 13 (1988), and that the Federal Rule of Civil Procedure specifically recognize the term "hearing" as a distinct term from trial. Fed. R. Civ. P. 12(d). However, in the instant case it cannot be concluded that any type of substantive hearing has taken place with respect to the merits of the Statland's case. It is undisputed that the parties initially appeared before Judge Aspen in response to the filing of the Statland's complaint. At the second hearing the parties agreed to proceed before this Magistrate Judge. Finally, at the third hearing the parties were called in before this Magistrate Judge to report on the status of this litigation as well as reach a decision as to the discovery schedule. None of these three appearances could be argued to have substantively determined any of the issues in the pending litigation or raised any arguments as to res judicata. Thus I have concluded that a hearing has not taken place for purposes of 26 U.S.C. § 7422(e).

Further, the law is clear that the Government may lawfully assess an additional tax deficiency while a suit for refund of taxes for the same tax year is pending in the district court. In *The Pfeiffer Company v. United States of America*, 518 F.2d 124 (8th Cir. 1975) the court addressed such an issue. There the taxpayer corporation reported and paid $19,000 in accumulated earnings taxes for the calendar year 1970. *Id.* at 124. After filing a claim for refund with the IRS and waiting six months as required by 26 U.S.C. § 6532 (1970), the taxpayer filed a district court refund suit in July, 1972. *Id.* at 126. Soon thereafter, the IRS audited the taxpayer's 1970 return and gave Pfeiffer the statutory 90-day notice of its determination to assess an additional accumulated earnings tax penalty of $44,877.39. On September 8, 1972, the Government filed its answer to plaintiff's complaint and on September 11 moved for a stay of proceedings required by §7422(e). *Id.* at 125.

The plaintiff argued that the Government's exclusive tax collection remedy under such a circumstance is by counterclaim in the pending suit. The district court did not agree. The Court of Appeals, in affirming this conclusion, stated "We agree with the District Court's conclusion that the assessment entered January 15, 1973, while the taxpayer's refund suit for the same tax year was pending in the district court was procedurally regular and enforceable." *Id.* at 128.

Here too, we are faced with a procedurally young suit in which no substantive rulings have taken place. The fact that the Statlands have produced some discovery is significant but not substantively so. To be sure, I find the USA's lack of diligence questionable but despite

this the USA's stay of proceedings pursuant to 26 U.S.C. §7422(e) is hereby granted.

Alternatively the Statland's have requested that this court conduct an examination to determine the propriety of the issuance of the June 4, 1993 Notice of Deficiency for 1976. The stay at this juncture prohibits such an examination but once the stay has expired the Statlands are certainly welcome to file a motion requesting such an examination if the need so arises.

CONCLUSION

For the reasons listed above the USA's stay of proceeding is granted through November 1, 1993.

IT IS SO ORDERED.

ENTER: SEPTEMBER 13, 1993

//s// Ronald A. Guzman
RONALD A. GUZMAN
United States Magistrate Judge

Copies to:

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Chicago, IL 60603

Ann L. Wallace
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Chicago, IL 60604

David S. Newman
U.S. Dept. of Justice
555 Fourth Street, NW
Washington, D.C. 20002

[Entered March 23, 1994]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DONALD A. STATLAND and IRIS R. STATLAND,	)	
Plaintiff,	)	
v.	)	**No. 92 CH 7858**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Pending is Plaintiffs' motion for amendment to this Court's September 13, 1993 Memorandum Opinion and Order. For the reasons listed below, this motion is denied.

BACKGROUND FACTS

On December 1, 1992, plaintiffs Donald A. Statland and Iris R. Statland ("Statlands") filed the instant action seeking a refund of taxes paid for the year 1976. On April 15, 1977 the Statlands filed their joint federal income tax return for the calendar year 1976 with the Internal Revenue Service in Kansas City, Missouri and paid the sum of $10,138.66 in income taxes. On February 6, 1980 the Statlands filed with the District Direc-

tor their first claim for refund of $315.00. On April 15, 1980 the Statlands filed a second claim for refund of $4,907.26. On September 24, 1980 the Statlands filed a third claim of refund for $4,022.70 based on a net operating loss carryback from 1976 to 1979. This amount was for an amount not including the amounts claimed on February 6, 1980 and April 15, 1980. Finally on December 17, 1986, at the request of the Appellate Division of the Internal Revenue Service, the Statlands filed with the District Director a claim for refund of $8,929.96.

On December 1, 1992 the Statlands filed the instant complaint seeking the $8,929.26. The USA filed an Answer to the Statland's complaint February 1, 1993. On February 12, 1993 Judge Aspen held the initial hearing in this case. On April 13, 1993 Judge Aspen held a second hearing in this case. During this second hearing Judge Aspen considered the matter and, with the agreement of the parties, reassigned this case to this Magistrate Judge.

On May 10, 1993 the Statlands informed this Court that they had complied with the USA's discovery request and that their request for documents was pending for response on June 7, 1993. On June 7th, however, rather than responding to the Statlands discovery, the USA faxed a letter to the Statlands stating that a Notice of Deficiency had been mailed on June 4, 1993. On the same day the USA served upon the Statlands a motion to stay proceedings for 150 days pursuant to 26 U.S.C. §7422(e). This Court granted the USA's motion to stay proceedings on September 13, 1993.

The Statlands now request that paragraph six (6) from the Opinion be amended to read as follows:

> Further, the law is clear the Government may lawfully assess an additional tax deficiency while a suit for refund of taxes for the same year is pending in the district court provided no Petition has been filed with the Tax Court. (underlined portion constitutes the requested amendment)

This Court declines to amend the Opinion as Plaintiff requests. Such an amendment would ignore the alternative bases on which the Internal Revenue Service (IRS) may demand an immediate assessment prior to the Tax Court's final determination of tax deficiency.

Under § 6213(a) once the IRS files a notice of deficiency, it cannot assess the deficiency until the 90 day or 150 day window, depending on whether the taxpayer is inside or outside the United States, has expired which gives the taxpayer an opportunity to file a Petition for redetermination of the deficiency with the Tax Court. 26 U.S.C. §6213(a) (1989). If the taxpayer fails to file a Petition, the IRS may immediately assess the taxpayer for the deficiency. *Id.*

If the taxpayer does file a Petition, normally the IRS is enjoined from seeking the assessment until the Tax Court makes a final decision as to the claimed deficiency. *Id.* However, even if the Tax Court has not made a final decision, the IRS is allowed to immediately assess the deficiency under three circumstances. *Id.* The first circumstance is when the IRS believes that the taxpayer is going to quickly depart the United States or conceal either himself or his property or distribute his property is a way that would tend to render ineffectual proceedings to recover the deficiency. 26 U.S.C. §6851(a) (1986).

Another circumstance is when the IRS finds that a § 501(c)(3) organization has made political expenditures that constitute a flagrant violation of the prohibition against making political expenditures.[1] 26 U.S.C. §6852(a) (1986). The third circumstance when the IRS may immediately assess a deficiency is when the IRS believes that "collection of the deficiency . . . will jeopardized by delay . . ." 26 U.S.C. §6821(a).

While no allegation has been made that any of the above circumstances exist in this case, it is clear that the IRS is able to immediately assess an alleged deficiency regardless of whether a final decision has been reached on the deficiency. Therefore, it is clear that the addition of the language suggested by the Plaintiffs would only muddy the waters already made clear by statutory language.

---

[1] According to § 501(c)(3) such organizations are defined as "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (11)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. §501(c)(3) (1989).

CONCLUSION

For the reasons listed above, the Plaintiffs' motion for amendment to this Court's September 13, 1993 Memorandum Opinion and Order is denied.

IT IS SO ORDERED.

ENTER: MARCH 23, 1994

//s// Ronald A. Guzman
RONALD A. GUZMAN
United States Magistrate Judge

Copies to:

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Washington, D.C. 20002

Minute Order Form

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge: **Ronald A. Guzman**

Sitting Judge if Other or Magistrate Judge
Than Assigned Judge

Case Number: **92 C 7858** Date: **January 25, 1995**

Case Title: **Donald A. Statland and Iris R. Statland -v- USA**

DOCKET ENTRY:

(10) [X] [Other docket entry] **Enter Memorandum Opinion and Order: Defendant USA's motion to dismiss is granted.**

(11) [X] [For further detail see order attached to the original minute order form.]

[X] Notices mailed by judge's staff.
[X] Mail AO 450 form.

[Entered January 25, 1995]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DONALD A. STATLAND, and IRIS R. STATLAND,	)	
Plaintiff,	)	
v.	)	**No. 92 C 7858**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Pending is Defendant United States of America's ("USA") motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). For the reasons listed the USA's motion is hereby granted.

BACKGROUND FACTS

On December 1, 1992, plaintiffs Donald A. Statland and Iris R. Statland ("Statlands") filed the instant action seeking a refund of $8,929.96 federal income taxes paid for the year 1976. The USA filed an Answer to the Statlands' complaint on February 1, 1993. Judge Aspen considered the matter and, with the agreement of the parties, reassigned this case to this Magistrate Judge.

The USA mailed a Notice of Deficiency to the Statlands on June 4, 1993, regarding the 1976 income tax. On the same day the USA served upon the Statlands a motion to stay proceedings for 150 days pursuant to 26 U.S.C. §7422(e). On September 13, 1993, this Court granted the motion for stay through November 1, 1993.

On August 23, 1993, the Statlands filed a timely petition in the Tax Court seeking a redetermination of the proposed deficiency in their 1976 income tax. Since this action is no longer stayed, the USA moves this Court to dismiss this action because it has lost jurisdiction over the determination of the Statland's 1976 income tax liability, according to 26 U.S.C. §7422(e).

The Internal Revenue Code, 26 U.S.C. §7422(e) provides:

> If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Claims Court for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of the of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States Claims Court, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the

> subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene. . .

The issue presented is whether the deficiency was determined in respect of the tax that is the subject matter of the Statlands' suit in this Court. The deficiency related to the Statlands' 1976 tax liability, as does the instant suit, and this Court therefore loses jurisdiction over the issue.

Defendant correctly stated the well established principle that each year is the origin of a new liability and of a separate cause of action. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719 (1948). One's total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the variety of contested issues and points that may bear on the final computation. *Finley v. U.S.*, 612 F.2d 166, 170 (5th Cir. 1980).

Despite the Statlands' attempts to separate the various components of their federal income tax liability for 1976, the primary issue is whether these components combine to realize a loss or instead establish that a deficiency was due in that year. *Falese v. U.S.*, 71-1 U.S. Tax Case ¶ 9113 (N.D. Ill. 1970). Exhibit B to Mr. Statland's complaint indicates that the unused investment tax credit for the year ended December 31, 1979 was carried back to the 1976 tax year.

Under 26 U.S.C. §7422(e), the Statlands may pursue their suit as to such a single claim either in the District Court or in the Tax Court, but they cannot litigate in both. *Flora v. U.S.*, 362 U.S. 145, 166, 80 S.Ct. 630, 641

(1960). A Notice of Deficiency was mailed to the Statlands regarding their 1976 tax liability. The proceedings in this Court were then stayed. In that time period the Statlands filed a petition in Tax Court for a redetermination of the deficiency for 1976, thereby opting to litigate in Tax Court.

The extent of the Tax Court's jurisdiction did not narrowly encompass the specific issues raised in the deficiency notice as compared to those involved in the refund suit. The Tax Court acquired jurisdiction, rather, over the subject matter of the refund as it referred to the cause or causes of action involved in the deficiency notice. *Finley*, 612 F.2d at 170. This included all possible issues controlling the determination of the amount of tax liability for the year in question whether or not raised by the deficiency notice. *Finley*, 612 F.2d at 170. The Tax Court therefore acquired jurisdiction over any matter concerning an adjustment to the Statlands' 1976 income tax liability. Accordingly, this Court is divested of jurisdiction over any issues regarding that same liability, and this suit must be dismissed. See *Finlay v. U.S.*, 55 A.F.T.R.2d 85-1086 (C.D. Cal. 1984); *Fairchild Industries Inc. v. U.S.*, 42 A.F.T.R.2d 78-6041 (Ct. Cl. 1978); *Dorsey v. U.S.*, 38 A.F.T.R.2d 76-5915 (Ct. Cl. 1976).

CONCLUSION

For the reasons listed above the USA's motion to dismiss is granted.

SO ORDERED **ENTER: JANUARY 25, 1995**

//s// Ronald A. Guzman
RONALD A. GUZMAN
United States Magistrate Judge

Copies to:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

DONALD A. STATLAND and
IRIS R. STATLAND
v.
UNITED STATES OF AMERICA

CASE NUMBER: 92 C 7858

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendant United States of America's motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) is granted.

January 25, 1995
Date

H. STUART CUNNINGHAM
Clerk

//s//
(By) Deputy Clerk

Minute Order Form

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge: **Ronald A. Guzman**

Sitting Judge if Other or Magistrate Judge
Than Assigned Judge

Case Number: **92 C 7858** Date: **June 30, 1995**

Case Title: **Donald A. Statland and Iris R. Statland -v- United States of America**

DOCKET ENTRY:

(10) [X] [Other docket entry] **Enter Memorandum Opinion and Order: Plaintiffs' motion to reconsider [42-1] is denied.**

(11) [X] [For further detail see order attached to the original minute order form.]

[X] Notices mailed by judge's staff.

[Entered June 30, 1995]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DONALD A. STATLAND, and IRIS R. STATLAND,	)	
Plaintiff,	)	
v.	)	**No. 92 CH 7858**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Pending is plaintiff, Donald A. Statland's ("Statland") motion to reconsider this court's Memorandum Opinion and Order of January 25, 1995. For the reasons listed below this motion is denied.

BACKGROUND FACTS

On January 25, 1995 this court granted defendant, United States of America, ("United States") motion to dismiss. At this time the United States moved to dismiss Statland's action because the action was no longer stayed and the Statlands had filed a timely petition in the Tax Court seeking a redetermination of the proposed deficiency in their 1976 income tax. The United States claimed that this court had lost jurisdiction over

the determination of the Statland's 1976 income tax liability pursuant to 26 U.S.C. §7422(e).

A motion to reconsider serves "to correct manifest errors of law or fact or to present newly discovered evidence." *See Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987). However, the motion may not be used to reiterate arguments the court has previously rejected. *In re Oil Spill by Amoco Cadiz*, 794 F.Supp. 261, 267 (N.D. 111.1992), aff'd 4 F.2d 997 (7th Cir. 1993).

The Statlands have asked this court to reconsider its ruling based on the contention that different issues affecting the liability for a single income tax year may be litigated in different fora. In general this rule is correct. The problem this court has in the instant case is that Mr. Statland has attempted to carry back the unused investment tax credit for the year ended December 31, 1979 to 1976. This implicates the 1976 return which is currently before the Tax Court on a redetermination of the proposed deficiency. Therefore, this court is divested of jurisdiction over any issues regarding the 1976 liability.

For the reasons listed above the Statland's motion to reconsider is denied.

SO ORDERED **ENTER: JUNE 30, 1995**

//s// Ronald A. Guzman
RONALD A. GUZMAN
United States Magistrate Judge

Copies to:

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C-1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

September 20, 1999

Mr. Donald A. Statland
55 West Monroe
Suite 600
Chicago, IL 60603

Re: Donald A. Statland, et ux.
v. United States
Application No. 99A233

Dear Mr. Statland:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on September 20, 1999, extended the time to and including November 28, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: //s// Sandra Elliott Spagnolo

Sandra Elliott Spagnolo
Assistant Clerk

Supreme Court, U.S.
FILED
JAN 13 2000

(2)

No. 99-893

In the Supreme Court of the United States

DONALD A. STATLAND AND IRIS R. STATLAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
PAULA M. JUNGHANS
Acting Assistant Attorney General
JONATHAN S. COHEN
ALICE L. RONK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court lost jurisdiction over petitioners' tax refund suit when petitioners filed a petition in the Tax Court seeking redetermination of the tax deficiency asserted by the Commissioner of Internal Revenue with respect to that same tax year.

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Internal Revenue Code (26 U.S.C.):
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§ 6512(b) 4
§ 6512(b)(1) 5
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28 U.S.C. 2402 10
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Miscellaneous:

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S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 6, 8
9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d ed. 1995 & Supp. 1999) 10

In the Supreme Court of the United States

No. 99-893

DONALD A. STATLAND AND IRIS R. STATLAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 178 F.3d 465. The memorandum opinions and orders of the district court (Pet. App. B1-B6, B7-B17) are unofficially reported at 73 A.F.T.R.2d 93-6195 and 75 A.F.T.R.2d 95-1471.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1999. A petition for rehearing was denied on July 1, 1999 (Pet. App. A15). On September 20, 1999, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 28, 1999 (Pet. App. C1). The petition for a writ of

certiorari was filed on November 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1992, petitioners filed a complaint in the United States District Court for the Northern District of Illinois seeking a refund of income taxes paid for the 1976 tax year. While that complaint was pending, the Commissioner of Internal Revenue issued a notice of deficiency to taxpayers asserting an income tax deficiency for that same year. Pursuant to Section 7422(e) of the Internal Revenue Code, 26 U.S.C. 7422(e), the district court stayed proceedings on the refund suit during the 90-day period in which petitioners were entitled to petition the Tax Court for a redetermination of the deficiency. During the period of that stay, petitioners filed a timely petition in Tax Court for the redetermination of their 1976 income tax liability (Pet. App. A1).

The district court thereafter granted the motion of the United States to dismiss the refund suit for lack of jurisdiction under 26 U.S.C. 7422(e). The court held that, under this statute, when petitioners filed their Tax Court petition seeking a redetermination of their tax liability for 1976, the district court lost jurisdiction over the refund suit for that same tax year. Pet. App. A2.

2. The court of appeals affirmed (Pet. App. A1-A14). The court rejected petitioners' contention that, notwithstanding 26 U.S.C. 7422(e), a district court retains jurisdiction over a refund suit when, as here, the notice of deficiency that gave rise to the Tax Court proceeding involved an adjustment other than the adjustments at

issue in the refund suit.[1] The court noted that, under 26 U.S.C. 7422(e), the district court refund suit must be dismissed whenever a Tax Court proceeding for the same tax year is commenced "prior to the hearing" of the refund suit. Although the notice of deficiency in this case was not issued until after the parties had appeared for status conferences on the refund suit in district court, the court of appeals concluded that those preliminary matters were "prior to the hearing" of the refund suit on the merits and did not sustain continuing jurisdiction over the refund suit in district court. Pet. App. A8. In the present case, an "actual trial" had not occurred on the refund claim and, indeed, "not one of the substantive legal issues raised in [petitioners'] district court case was considered by the court" (*ibid.*).

The court of appeals also rejected the assertion that the dismissal of the district court refund suit deprived petitioners of a constitutional right to a jury trial. The court noted that petitioners could have obtained a jury trial by electing to proceed with the refund suit instead of filing the Tax Court petition (Pet. App. A14).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 7422(e) of the Internal Revenue Code, if a taxpayer seeks review of a deficiency in Tax

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[1] The notice of deficiency was based on a reduction in a 1979 net operating loss that petitioners sought to carry back to the 1976 tax year. The district court refund suit involved adjustments to taxpayers' distributive share of partnership income and their entitlement to an additional exemption for a dependent for the 1976 tax year. Pet. App. A2-A4.

Court "prior to the hearing" of an income tax refund suit brought by that taxpayer in district court with respect to the same tax, the district court in which the refund suit is pending "shall lose jurisdiction" of the refund suit. 26 U.S.C. 7422(e). The pending refund issues, along with the additional issues presented by the notice of deficiency, are then adjudicated in the Tax Court. *Ibid.* See 26 U.S.C. 6512(b).

This statutory scheme gives "the taxpayer an option, once he has received a ninety day deficiency notice from the Commissioner, to petition the Tax Court for redetermination of the asserted deficiency or to refrain from filing such a petition and, having paid the alleged deficiency in full, proceed in the District Court on its suit for refund." *United States* v. *Joe Graham Post No. 119, American Legion*, 340 F.2d 474, 476-477 (5th Cir.), cert. denied, 382 U.S. 824 (1965). As this Court has explained, "in the rare case where the taxpayer brings suit in a District Court and the Commissioner then notifies him of an additional deficiency," this statute provides the taxpayer with "the option of pursuing his suit in the District Court or in the Tax Court, *but he cannot litigate in both.*" *Flora* v. *United States*, 362 U.S. 145, 166 (1960).

That holding applies directly here. When petitioners filed their petition in the Tax Court, that court acquired jurisdiction to determine their claim for refund and the district court "los[t] jurisdiction" over the refund claim at that time. 26 U.S.C. 7422(e). See 26 U.S.C. 6512(b).

2. Petitioners err in contending (Pet. 14, 19-23) that the district court retains jurisdiction over a refund suit that raises different issues than those raised by the Commissioner in the notice of deficiency that gave rise to the Tax Court proceeding. That contention is based on the incorrect proposition that the "subject matter"

over which the Tax Court acquires jurisdiction is limited to the issues raised by the notice of deficiency (Pet. 20). When a taxpayer files a timely Tax Court petition, "the Tax Court acquires jurisdiction over the entire cause of action, necessarily including all possible issues controlling the determination of the amount of tax liability for the year in question whether or not raised by the deficiency notice." *Finley* v. *United States*, 612 F.2d 166, 170 (5th Cir. 1980). Congress has thus authorized the Tax Court to award a refund of any "overpayment" of tax made for the "same taxable year" involved in the notice of deficiency. 26 U.S.C. 6512(b)(1). See 26 U.S.C. 6512(b)(2).

A taxpayer's total income tax liability for each taxable year constitutes a single, unified cause of action regardless of the variety of contested issues that may bear on the final computation. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948); see *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 366 (1931). The courts have thus consistently held that, under 26 U.S.C. 7422(e), when a taxpayer elects to seek relief in the Tax Court, the district court loses jurisdiction to adjudicate the taxpayer's refund suit involving the same taxable year. *Finley* v. *Commissioner*, 612 F.2d at 170; *United States* v. *Joe Graham Post 119, American Legion*, 340 F.2d at 477; *Russell* v. *United States*, 592 F.2d 1069, 1071 (9th Cir.), cert. denied, 444 U.S. 946 (1979); *Dorl* v. *Commissioner*, 507 F.2d 406, 407 (2d Cir. 1974).[2]

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[2] As the legislative history of Section 7422(e) explains in detail:

> The result under subsection (e) is to give jurisdiction over the cause of action to only 1 court (2 courts may acquire jurisdiction under existing law), and to give the taxpayer the choice of which court shall have jurisdiction. The taxpayer, by filing a petition in the Tax Court, would cause that court to have sole

Petitioners err in asserting (Pet. 21) that the decision in this case conflicts with the decision in *United States* v. *Joe Graham Post 119, American Legion, supra.* That case did not hold, as petitioners contend, that "issues not challenged in the taxpayer's Tax Court petition remain[ed] within the jurisdiction of the United States District Court" (Pet. 21). In the *Joe Graham* case, the taxpayer had instituted a refund suit in district court concerning the fiscal year ending June 30, 1961. 340 F.2d at 476. While that refund suit was pending, the Commissioner issued a notice of deficiency for several calendar years, including the calendar year ending December 31, 1960. *Ibid.* The question addressed in that case was whether 26 U.S.C. 7422(e) divested the district court of jurisdiction over the refund claim for the fiscal year July 1, 1960 through June 30, 1961, which *overlapped* for a six-month period with the calendar year January 1, 1960 through December 31, 1960, that was before the Tax Court. 340 F.2d at 476. The critical question in that case was whether the fiscal or the calendar year was the correct accounting period. *Ibid.* The court stated that *if* the correct accounting period was the calendar year—the period for which the notice of deficiency had been issued and the Tax Court's jurisdiction invoked—the Tax Court would have acquired jurisdiction over that entire year and the district court would be divested of jurisdiction. *Id.* at 476-478. If, however, the correct accounting period was the fiscal year, the court concluded that the

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jurisdiction, or, by failing to file a petition in the Tax Court, would cause the district court or the Court of Claims to have sole jurisdiction.

S. Rep. No. 1622, 83d Cong., 2d Sess. 611 (1954). See also H.R. Rep. No. 1337, 83d Cong., 2d Sess. A431 (1954).

Tax Court would lack jurisdiction over the subject matter of the refund suit. *Ibid.* Thus, once the proper tax year was determined, one court would possess jurisdiction over all issues relating to the liability for that year. See *ibid.* The court concluded in the *Joe Graham* case that the Tax Court had jurisdiction to make this determination of the correct accounting period because, by filing a Tax Court petition, the taxpayer had placed that issue before that court. *Id.* at 476. Neither the holding nor the reasoning of *Joe Graham* supports petitioners' position in this case.

Petitioners err in relying (Pet. 22) on *Hemmings* v. *Commissioner*, 104 T.C. 221 (1995). In *Hemmings*, the taxpayers asserted in the Tax Court that the Commissioner was barred from determining a deficiency in respect of the 1984 tax year because a final judgment had been entered in the district court on a refund suit for that year. The Tax Court stated that 26 U.S.C. 7422(e) did not apply to that case because the notice of deficiency was issued after the refund suit had gone to judgment. 104 T.C. at 229-230. The Tax Court further noted that, while 26 U.S.C. 6212(c) bars the Commissioner from issuing a second notice of deficiency for the same year after the taxpayer has petitioned the Tax Court with respect to the first notice of deficiency for that year, "[t]he filing of a refund action in the District Court or the Claims Court * * * does not statutorily bar the Commissioner from issuing a notice of deficiency for the same taxable year pursuant to section 6512(a)." 104 T.C. at 230. The Tax Court thus concluded in *Hemmings* that there was no statutory bar to the assertion of the additional deficiency by the Commissioner. The court further noted that neither *res judicata* nor collateral estoppel precluded the Commissioner's action, for it is well established that the

government's claim for unassessed additional taxes is not a compulsory counterclaim in a refund suit. See *id.* at 234-235. These holdings have no relevance to the question presented in this case.[3]

3. By requiring dismissal of the district court action when the Tax Court proceeding is commenced "prior to the hearing" of the case in the district court, 26 U.S.C. 7422(e) divests the district courts of jurisdiction over claims that have not been heard on the merits or have not proceeded to "actual trial." S. Rep. No. 1622, 83d Cong. 2d Sess. 611 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. A431 (1954); *Brown* v. *Commissioner*, 71 T.C.M. (CCH) 2301 (1996). The court of appeals correctly concluded that the status and scheduling conferences that had been conducted in the district court before the Tax Court petition was filed did not bar application of the statute in this case. As the court stated, the district court action was properly dismissed under 26 U.S.C. 7422(e) because, before the notice of deficiency was issued, "not one of the substantive legal issues raised in the [taxpayers'] district court case was considered by the court." Pet. App. A8.

Contrary to petitioners' contention (Pet. 14, 25), that holding does not conflict with the decision of this Court in *Federal Deposit Insurance Corporation* v. *Mallen*, 486 U.S. 230, 247-248 (1988). That case did not concern the meaning of the term "hearing" (or any other term) in 26 U.S.C. 7422(e). Instead, it concerned the constitutionality of a statutory provision that authorized the

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[3] Petitioners similarly err in relying (Pet. 22-23) on the dissenting opinion of Judge Beghe in *Estate of Mueller* v. *Commissioner*, 107 T.C. 189, 236-237 (1996), aff'd, 153 F.3d 302 (6th Cir. 1998). That case did not concern the application of 26 U.S.C. 7422(e). Instead, it addressed the proper application of the doctrine of equitable recoupment. 107 T.C. at 192.

Federal Deposit Insurance Corporation to suspend from office an indicted official of a federally insured bank. 486 U.S. at 235-236. The Court rejected the contention that the statute involved in that case violated the Due Process Clause because it did not guarantee an opportunity to submit oral testimony at a post-suspension hearing. *Id.* at 235. Nothing in that decision in any manner addresses, or has relevance to, the proper construction of 26 U.S.C. 7422(e).

Other cases cited by petitioners are similarly inapposite. For example, *United States ex rel. Stinson* v. *Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), and *Menard* v. *Bowman Dairy Co.*, 15 N.E.2d 1014, 1015 (Ill. App. Ct. 1938), on which petitioners rely (Pet. 25), do not address the meaning of the term "hearing" in 26 U.S.C. 7422(e). In *Stinson*, a law firm brought suit against an insurer under the *qui tam* provisions of the False Claims Act. 944 F.2d at 1151. That Act precludes *qui tam* actions stemming from allegations or transactions disclosed publicly in a civil hearing. 31 U.S.C. 3730(e)(4)(A). The district court had dismissed the *qui tam* action for lack of jurisdiction because it was based on information obtained during civil discovery in another case. The court of appeals affirmed, and in doing so rejected the contention that the term "hearing" in the *qui tam* statute did not encompass a civil "proceeding" or civil litigation. 944 F.2d at 1155. Nothing in that decision has relevance to this case.

The decision in *Menard* concerned the application of an Illinois statute that provided that a plaintiff may dismiss an action without prejudice "at any time before trial or hearing begins" but thereafter may dismiss only upon the filing of a stipulation signed by the defendant or pursuant to an order of the court made on special motion and supported by affidavit. 15 N.E.2d at 1015.

The court held that the term "hearing" in the statute applied to hearings before a Master of Chancery. That decision provides no guidance to the interpretation of 26 U.S.C. 7422(e).

4. There is no merit to petitioners' assertion (Pet. 15-18) that dismissal of their refund suit violates their constitutional right to a jury trial. The Seventh Amendment preserves the right to a jury trial "in suits at common law"; this constitutional right to jury trial does not apply to civil actions against the United States. *McElrath* v. *United States*, 102 U.S. 426, 440 (1880); see 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2314, at 111-116 (2d ed. 1995 & Supp. 1999). A right to jury trial exists for civil actions against the United States only when a statute so provides. See *Wickwire* v. *Reinecke*, 275 U.S. 101, 105 (1927). Petitioners' claim of a constitutional right to a jury trial of tax refund issues is therefore incorrect and has consistently been rejected by the courts. See, *e.g.*, *Coleman* v. *Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986); *Hudson* v. *United States*, 766 F.2d 1288, 1292 (9th Cir. 1985); *McCoy* v. *Commissioner*, 696 F.2d 1234, 1237 (9th Cir. 1983); *Blackburn* v. *Commissioner*, 681 F.2d 461 (6th Cir. 1982); *Mathes* v. *Commissioner*, 576 F.2d 70, 71 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

Under 28 U.S.C. 2402, a tax refund suit may be tried to a jury if either party requests it. Nothing in the application of 26 U.S.C. 7422(e) to this case deprived petitioners of this statutory right to a jury trial. As the court of appeals emphasized (Pet. App. A14), petitioners could have maintained their action in the district court and thereby exercised their statutory right to a jury trial simply by electing not to file a Tax Court

petition.[4] See *Olshausen* v. *Commissioner*, 273 F.2d 23, 27 (9th Cir. 1959), cert. denied, 363 U.S. 820 (1960). It was by their own election to file a Tax Court petition that petitioners foreclosed their opportunity to seek an alternative form of judicial determination of their refund claim. See *First National Bank of Chicago* v. *united States*, 792 F.2d 954, 955 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987); *Solitron Devices, Inc.* v. *United States*, 862 F.2d 846, 848 (11th Cir. 1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

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[4] In *The Pfeiffer Co.* v. *United States*, 518 F.2d 124, 129 (8th Cir. 1975), the court noted that, when the Commissioner of Internal Revenue issues a notice of deficiency with respect to the same taxable year for which a refund suit is pending, if the taxpayer does not file a petition for redetermination of the deficiency in the Tax Court, the taxpayer may pay the deficiency, file a second refund suit in the district court and move to consolidate the refund suits pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.